

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

---

DINAH HUBERT and JOHN HUBERT,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.: 05-2337 (JLL)
	)	
PATRICK BARTELS, ESQ. and LYNCH	)	<b>OPINION</b>
MARTIN, ESQ.,	)	
	)	
Defendants.	)	
	)	

---

For Plaintiff: Thomas D. Flinn (*Garrity, Graham, Murphy, Garofalo & Flinn*)  
Izabella Lemkhen (*Garrity, Graham, Murphy, Garofalo & Flinn*)

For Defendant: Noel E. Schablik (*Schablik and Knapp, P.A.*)  
John T. Knapp (*Schablik and Knapp, P.A.*)

**LINARES, District Judge.**

This matter comes before the Court on the motion for summary judgment filed by Defendants Patrick Bartels, Esq. and Lynch Martin, Esq. (collectively “Defendants”) on September 30, 2009. This Court exercises jurisdiction pursuant to its diversity jurisdiction. 28 U.S.C. § 1332. For the reasons set forth in this Opinion, Defendant’s motion for summary judgment is denied.

**FACTS**

This legal malpractice action arises from the settlement of a products liability case brought by Dinah and John Hubert (collectively “Plaintiffs”) concerning Dinah Hubert’s breast implants. Dinah Hubert received her first set of breast implants in 1984. (Def. Rule 56.1

Statement ¶ 6.) After experiencing complications following the insertion of the original implants, Dinah Hubert had the first set removed and a different set inserted in 1988. (Id. ¶¶ 6-7.) After the second set of breast implants was inserted, Dinah Hubert's health deteriorated, and she had the second set of implants removed in 1992. (Id. ¶ 7.)

In April 1992, the Huberts retained the law firm of Garruto Galex and Cantor to represent them in a personal injury action against Bristol Meyers Squib ("BMS"), the manufacturer of both sets of Dinah's breast implants. (Id. ¶ 8.) Although a national class settlement concerning breast implants was proceeding in the Northern District of Alabama, Plaintiffs opted out of the federal class settlement program, and their case was assigned to Middlesex County Superior Court in New Jersey. (Id. ¶ 9.) At some point in 1995, reassignment of cases within Garruto Galex and Cantor resulted in Plaintiffs' breast implant products liability case being assigned to Patrick Bartels, Esq. ("Bartels"), then an associate at the firm. (Id. ¶ 10.)

Eventually, Bartels and Plaintiffs engaged in mediation with BMS on April 5, 2000, in Houston, Texas. (Id. ¶ 15.) The mediation resulted in a settlement for \$150,000, with Plaintiffs only being subject to confidentiality regarding the amount of the settlement. (Id. ¶¶ 16-17; Hubert Cert. ¶¶ 23-25.) The settlement also called for payment to Plaintiffs by May 8, 2000. (Def. Rule 56.1 Statement ¶ 17.)

Subsequent to the April 5, 2000 mediation, BMS and Bartels attempted to work out a final version of the settlement agreement for execution. (Id. ¶ 19-20.) During the negotiations, Plaintiffs became dissatisfied with the final form the settlement was taking. (Id. ¶ 18; Hubert Cert. ¶¶ 26-28.) These issues resulted in a motion to enforce the settlement agreement by BMS, and a cross-motion by Plaintiffs to be released from the settlement. (Def. Rule 56.1 Statement ¶

20.) At a hearing on July 21, 2000, the Honorable Marina Corodemus, J.S.C., held that the settlement was enforceable and the parties agreed to a form of release. (Id. ¶ 22; Flinn Cert. Ex. Q, passim; Hubert Cert. ¶¶ 30-33.) At the hearing, Plaintiffs assented to the terms of the settlement as modified by Judge Corodemus through Bartels. (Flinn Cert. Ex. Q at 26:24-29:16.)

Plaintiffs subsequently sued Defendants for legal malpractice in the Superior Court of Essex County, New Jersey. Defendants removed to this Court on May 5, 2005. The case was stayed on August 30, 2005, and restored to the active trial calendar on June 9, 2009. The instant motion for summary judgment followed.

### **DISCUSSION**

#### **A. LEGAL STANDARD ON A MOTION FOR SUMMARY JUDGMENT**

A court shall grant summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

On a summary judgment motion, the moving party must show, first, that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to present evidence that a genuine issue of material fact compels a trial. Id. at 324. In so presenting, the non-moving party must offer specific facts that establish a genuine issue of material fact, not just “some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Thus, the non-moving party may not rest upon the mere allegations or denials in its pleadings. See Celotex, 477 U.S. at 324. Further, the non-moving party cannot rely on unsupported assertions,

bare allegations, or speculation to defeat summary judgment. See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999). The Court must, however, consider all facts and their reasonable inferences in the light most favorable to the non-moving party. See Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

**B. ANALYSIS OF LEGAL ISSUE PRESENTED IN INSTANT MOTION**

Defendants' motion presents a single issue to this Court: whether or not the New Jersey Supreme Court's decision in Puder v. Buechel, 874 A.2d 534 (N.J. 2005), compels this Court to grant summary judgment. Defendants argue that the strong public policy announced in Puder bars Plaintiffs' malpractice suit because she accepted the settlement offered in her original personal injury lawsuit. (Def. Br. 17-18, 27-28.) Plaintiffs maintain that Puder does not apply to the instant facts and that summary judgment is not appropriate at this time.<sup>1</sup> (Pl. Opp. Br. at 16-32.)

Puder began as an action to collect fees from a divorce, in which the client counterclaimed for legal malpractice concerning the divorce. 874 A.2d at 535. In the counterclaim, the client pled that the attorney had obtained an inadequate divorce settlement and failed to obtain informed consent prior to accepting the settlement. Id.

In the underlying divorce action, the original attorney had obtained a divorce settlement to which the client originally agreed. Id. at 536. The client then consulted another attorney who

---

<sup>1</sup>Plaintiffs also assert that Defendants made impermissible arguments concerning summary judgment on the substance of their case, and that such arguments are premature. (Pl. Opp. Br. at 33-34.) This Court finds that Defendant's moving brief contains argument only as to the issue of whether Puder bars this suit, and Plaintiffs' arguments to the contrary do not require further attention herein.

expressed the opinion that the settlement was “ridiculously inadequate.” Id. The client fired the original attorney and filed a malpractice lawsuit against the original attorney which was stayed pending the outcome of a hearing on the enforceability of the settlement worked out by the original attorney. Id. After six days of testimony in the hearing to enforce the settlement, but prior to any ruling on the enforceability of the settlement, the parties informed the motion judge that a new settlement had been reached. Id. “The new settlement was substantially similar to the disputed settlement[,]” and the new settlement was found by the motion judge to be entered into knowingly and voluntarily. Id. at 536-38.

The client in Puder then sought to litigate the stayed malpractice action against the original attorney. Id. at 538. After the trial court granted summary judgment to the original attorney and the Appellate Division reversed, the Supreme Court of New Jersey was presented with the question of whether or not the second settlement barred the malpractice suit. Id. at 538-39. Holding that the public policy of New Jersey encouraging settlements was the determinative factor, the Supreme Court of New Jersey held that the second settlement barred the client’s claim against her original attorney. Id. at 540.

In doing so, the New Jersey Supreme Court distinguished an earlier case concerning matrimonial legal malpractice, Ziegelheim v. Apollo. 607 A.2d 1298 (N.J. 1992). In Ziegelheim, a client entered into a settlement agreement in a divorce action allocating about fourteen percent of the marital assets to the client after the client’s lawyer advised her that she could expect no more than ten to twenty percent of the marital property after a trial. 607 A.2d at 1301. One year later, the client sought to set aside the property settlement and recover from her original attorney in a malpractice case. Id. at 1301. After the property settlement was found to

be enforceable, the malpractice case went forward, eventually reaching the Supreme Court of New Jersey after a grant of summary judgment to the defendant by the trial court and a partial reversal by the Appellate Division. Id. at 1301-03. The Supreme Court of New Jersey held that the malpractice action against the attorney should have been allowed to go to trial, because there was a genuine dispute concerning the competence of the original attorney, including the attorney's advice on the likelihood of the client receiving no more than twenty percent of the marital assets after trial. Id. at 1303-04. In doing so, the Ziegelheim court refused to adopt a rule whereby malpractice actions would be barred by settlement of the case unless actual fraud could be proven, finding that the public policy in favor of settlements in New Jersey was not broad enough to justify such a rule. Id. at 1304.

This Court finds that the facts of this case require the application of Ziegelheim rather than Puder. While it is true that Puder prevents some malpractice actions from going forward after settlement, it did not abrogate Ziegelheim. Puder, 874 at 542-43. In this case, there was no second settlement similar to an initial settlement, nor did the Plaintiffs seek the advice of new counsel that changed their state of knowledge with regard to a second settlement. All that has occurred in this case is that a settlement was reached and was found enforceable after the Plaintiffs sought release from the deal they had struck. Despite any regrets they may have had about their settlement negotiations, however, they continued to rely on the professional advice of Defendants. Having received information after the enforceability hearing in 2000 that there may have been a defect in the professional advice they received from Defendants in their original and only settlement, they filed the instant suit. Their position is analogous to the Ziegelheim plaintiff who, after a settlement was entered into, discovered that she might have received another thirty

percent of the marital estate had she gone to trial. While this Court agrees that the public policy of New Jersey is strongly in favor of settlements, the New Jersey Supreme Court has permitted malpractice suits to go forward after settlement under circumstances such as those presented here: “[t]he fact that a party received a settlement that was ‘fair and equitable’ does not mean necessarily that the party’s attorney was competent or that the party would not have received a more favorable settlement had the party’s incompetent attorney been competent.” Ziegelheim, 607 A.2d at 1305. This Court, therefore, denies the instant motion for summary judgment brought by Defendants.

### **CONCLUSION**

For the reasons set forth in this Opinion, Defendant’s motion for summary judgment is denied. An appropriate Order accompanies this Opinion.

DATED: February 4, 2009

/s/ Jose L. Linares

United States District Judge